STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS LATHAM,

Plaintiff-Appellee,

v

BARTON MALOW COMPANY,

Defendant-Appellant.

UNPUBLISHED
October 17, 2006

No. 264243
Oakland Circuit Court
LC No. 04-059653-NO

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order denying its motion for summary disposition under MCR 2.116(C)(10), in this case involving a general contractor's liability under the common work area doctrine. We affirm.

Plaintiff, a skilled carpenter employed by B & H Construction, was injured while loading sheets of drywall from a scissors lift onto the mezzanine level of a construction project. The mezzanine was designed to house air handling equipment, was constructed of steel and had a cement floor. An approximate six-foot wide opening provided access to the mezzanine level while it was under construction. Although there was a safety cable to protect workers from the opening, the cabling had to be removed in order to access the mezzanine. The only way to access the mezzanine was by a lift or ladder. Plaintiff lost his balance while loading a sheet of drywall onto the mezzanine from the lift and fell approximately 17 feet to the floor below, sustaining serious injuries. Plaintiff sued defendant, the general manager of the project, for negligence. The trial court denied defendant's motion for summary disposition, finding that a question of fact existed regarding defendant's liability under the common work area doctrine.

This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

Defendant argues that there is no genuine issue of material fact concerning whether plaintiff's claim falls within the common work area exception to the general rule that a

contractor is not liable for injuries to a subcontractor's employee. To prove liability under the common work area doctrine,

> a plaintiff must prove four elements: (1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area. [*Ormsby v Capital Welding, Inc*, 471 Mich 45, 57; 684 NW2d 320 (2004) (footnote omitted).]

The plaintiff must satisfy all four elements of this test and failure to satisfy any one is fatal to the claim. *Id*. at 59.

Defendant first argues that the trial court misapplied the common work area doctrine because it did not properly determine if there was a high degree of risk to a significant number of workers at the time of plaintiff's injury. In support of its position, defendant relies on footnote 12 in *Ormsby, supra*, where the Court stated:

> Justice Kelly asserts in her dissent that the Court of Appeals disagreed with the trial court's conclusion that plaintiff had failed to establish a genuine issue of material fact that a high degree of risk to a significant number of workers existed. This is incorrect. The Court of Appeals specifically stated that it limited its discussion and decision to the question whether plaintiff was injured in a common work area. 255 Mich App at 188. Justice Kelly goes on to indicate that she would find a genuine issue of material fact whether a significant number of workers were exposed to danger on the basis that a mason was right below plaintiff when he fell, and because any worker at the site would be working in, around and under the steel structure after it was erected and all such workers would be exposed to an extremely dangerous condition if the structure was not competently constructed. We disagree. The fact that one worker was below plaintiff when he fell certainly does not establish a genuine issue of material fact regarding whether a high degree of risk to a *significant* number of workers existed. Justice Kelly's vague reference to "any worker" being exposed to danger if the structure was not competently constructed is likewise insufficient to create a genuine issue of material fact. The high degree of risk to a significant number of workers must exist when the plaintiff is injured; not after construction has been completed. [*Ormsby, supra* at 59-60 n 12 (emphasis in original).]

Defendant maintains that the Supreme Court in *Ormsby* held that the plaintiff's injury must result from a condition that posed a high risk of danger to a significant number of other workers at the time of the plaintiff's injury. We believe that defendant has read footnote 12 out of context. In footnote 12, the Court was responding to Justice Kelly's dissent, so the footnote must be read in the context of Justice Kelly's dissenting opinion. Properly viewed, our Supreme Court did not limit the doctrine to only those situations where other workers are also exposed to a high risk at the same time the plaintiff was injured. Instead, the test requires that a significant number of workers must work in the same area and be subjected to the same risk at some point during construction. See *Johnson v Turner Constr Co*, 198 Mich App 478, 481; 499 NW2d 27 (1993), overruled in part on other grounds in *Ormsby, supra* at 56-57 n 8, and *Erickson v Pure*

Oil Corp, 72 Mich App 330, 336-338; 249 NW2d 411 (1976), overruled in part on other grounds in *Ormsby, supra*. Contrary to defendant's argument, while the common work area doctrine required plaintiff to prove that the condition that caused his injury would affect a significant number of other employees, plaintiff was not required to prove that a significant number of other employees were at risk at the same time plaintiff was injured. The doctrine focuses on the risk to other workers during the construction phase. Thus, the focus is on whether the condition that caused the plaintiff's injury would expose a significant number of other workers to the same risk of danger when they would be required to work in the same area.

In this case, plaintiff faced the danger of working on an elevated platform that did not have any permanent perimeter protection to protect him from falling while loading materials onto the mezzanine. The trial court was properly aware of the danger to plaintiff when it noted that other workers, like plaintiff, "required fall protection as the area was accessible only by ladders or lifts and the Defendant's Construction Supervisor testified that, like the Plaintiff, these workers also had to remove existing safety cabling for entry and exiting purposes." Moreover, the trial court correctly concluded that there was a genuine issue of material fact whether the mezzanine was a common work area that several workers would need to access to complete their work. There was evidence that employees of two or more other subcontractors, including plumbers, electricians, and painters, had to access the mezzanine to perform their work. Like plaintiff, these workers also had to reach that area using a ladder or lift without perimeter protection. Thus, these other workers were exposed to the same risk of falling from the mezzanine while loading materials onto it.

We find no merit to defendant's argument that plaintiff's failure to wear some form of personal fall protection created the risk of danger. While a personal fall protection device might have prevented plaintiff 's injuries, the trial court correctly focused on the risk of danger posed by the elevated mezzanine's lack of perimeter protection.

We also find no merit to defendant's argument that the trial court improperly focused on the entire construction project. The trial court properly analyzed the danger plaintiff faced and concluded that other workers also faced the same risk of danger when accessing the mezzanine with their materials.

This case is factually distinguishable from *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 6-9; 574 NW2d 691 (1997). In *Hughes*, only four workers faced the same risk of danger as the plaintiff. The case did not involve a risk of danger to a significant number of workers. Here, in addition to plaintiff and his partner, two other drywallers from B & H Construction, electricians, plumbers, and painters were all exposed to the same risk. Moreover, four or five workers were required to move the air handling equipment onto the mezzanine.

We disagree with defendant's contention that the mezzanine was not a common work area because it was isolated, not unlike the storage area at issue in *Ghaffari v Turner Const Co*, 259 Mich App 608, 616; 676 NW2d 259 (2003), rev'd on other grounds 473 Mich 16 (2005). The doctrine does not require that the risk occur in a high traffic area, and the facts of this case do not establish that the mezzanine was similar to the storage room in *Ghaffari*. Although the mezzanine was not generally accessible without a lift or ladder, as previously discussed, there was evidence that a significant number of other workers were required to access it to perform their work during the construction process.

Finally, defendant argues that the trial court erred in ruling that there was a genuine issue of material fact with regard to whether it had supervisory and controlling authority over the job site because it had the authority to halt all work and to require plaintiff's employer to follow appropriate safety precautions. Defendant argues that the trial court applied this element too broadly. Our Supreme Court however, has held that liability under the common work area exception applies where a "contractor failed to take reasonable steps within its supervisory and coordinating authority . . . to guard against readily observable and avoidable dangers." *Ormsby, supra* at 57. Here, the trial court observed that there was evidence that defendant had the authority to stop work on the job site and require its subcontractors to follow appropriate safety precautions. The deposition testimony of defendant's employees support this determination.

The trial court correctly noted that the focus of this element is whether it was reasonable for defendant to require plaintiff's employer to follow certain safety precautions. Defendant's argument, in essence, focuses on what was reasonable under the facts of this case. Because B & H Construction was hired to perform the drywall work, a jury could find that it was reasonable for defendant to allow B & H Construction to determine how to best perform that work, including how to load the drywall onto the mezzanine. Conversely, because other tradesmen would also need to work on the mezzanine, a jury could conclude that it would have been reasonable for defendant to enforce specific safety measures that required the use of personal fall protection devices or other safety measures to protect all workers while performing jobs on the mezzanine.

Defendant argues that this element should not be so broadly construed that it requires general contractors to control all aspects of the jobs subcontractors performed. We do not believe that imposing liability in this case would involve micromanagement of subcontractors as defendant contends. Instead, we conclude it would be consistent with the common work area exception because it would require general contractors to adopt reasonable safety measures for those areas of a job site that pose particular risks to a significant number of workers. The risk in this case is unique because of the design of the particular construction project, not necessarily because of the type of work that was being performed.

The trial court properly concluded that a question of fact existed as to whether defendant took reasonable steps within its supervisory and controlling authority to guard against an avoidable danger. Even if plaintiff would not have taken instruction from defendant on how to perform his job, this did not prevent defendant from asserting its authority regarding safety on the job. Defendant's superintendent admitted that he had the authority to tell an individual to stop working if he was doing something in an unsafe manner. Defendant was responsible for ensuring that the safety cable on the mezzanine was in place to protect against falls, but it was also foreseeable that each subcontractor that worked on the mezzanine would have to remove that cable to access the mezzanine. A jury could find that defendant should have taken other steps to ensure that all workers accessing the mezzanine were adequately protected from falls when the safety cable had to be removed.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael J. Talbot